BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 27978
	)	
CAROLE R. MASON	)	**BOARD DECISION**
	)	(Precedential)
From medical termination from the position of Youth Counselor at the Karl Holton School, Department of the Youth Authority at Stockton	)	**NO. 93-08**
	)	March 3, 1993

Appearances: Mark A. Steinberg, Staff Legal Counsel, California Correctional Peace Officers Association, representing appellant Carole R, Mason; Ramon M. de la Guardia, Deputy Attorney General, representing the Department of the Youth Authority at Stockton.

Before Carpenter, President; Stoner, Vice President; Ward and Bos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted a petition for rehearing filed by the Carole R. Mason (appellant or Mason), a Youth Counselor at the Karl Holton School, California Department of Youth Authority (Department or CYA), at Stockton. The appellant had filed an appeal from a "constructive medical termination," charging that the Department improperly refused to return her to work for medical reasons.[1] The matter was originally heard by an Administrative Law Judge (ALJ) who ruled that appellant was not medically terminated pursuant to Government Code section 19253.5 or suspended under Government Code section 19570 and therefore the

[1]The appellant later amended the appeal to call it an appeal from a constructive medical suspension as the Department reinstated her shortly after she filed the appeal.

Board did not have jurisdiction to hear the appeal. The Board adopted the proposed decision of the ALJ. Subsequently, the appellant filed a petition for rehearing with the Board, urging the Board to reconsider the jurisdictional issue. On March 19, 1991, the Board granted the petition for rehearing.

The parties did not request oral argument. Having reviewed the written briefs submitted by the parties, and the amicus brief submitted by the California State Employee's Association, the Board makes the following determinations.

FACTUAL SUMMARY

The appellant began working for the State on November 15, 1973, as a Clerk Typist with the Department of the Youth Authority. On February 1, 1976, she was appointed to the position of Group Supervisor with the Department of the Youth Authority at Karl Holton School. She became a Youth Counselor on October 10, 1979. The appellant was off work from October 6, 1988, to May, 1990. She was originally off work on industrial disability leave (IDL) due to a work-related shoulder injury. After IDL expired, the appellant was on vocational rehabilitation temporary disability (VRTD).

During the period of appellant's absence, she filed for disability retirement with the Public Employees' Retirement System (PERS). On or about February 16, 1990, PERS determined that she was "not substantially incapacitated [sic] for the performance of her job duties" and denied her application for disability

retirement. She was advised by PERS that she should consider one of the following alternatives:

1. Continue or resume working with the Department of the Youth Authority.

2. Transfer to a different job with the same agency or another employer.

3. Discontinue PERS employment and leave her accumulated contributions in the Retirement Fund.

4. Terminate PERS employment and request a refund of accumulated contributions.

On February 27, 1990, the appellant contacted the Department and requested to return to work effective March 5, 1990. The Department advised the appellant she could not return to work until she obtained a medical release from the physician treating her for the injury to her shoulder (David L. Evans, M.D.) and from her family physician who was treating her for hypertension and diabetes (Barbara J. Nasa, M.D.).[2] The reasons provided the appellant as to why she was not permitted to return without medical clearance were 1) she was on vocational rehabilitation temporary disability for a serious work related injury, 2) she had been off work for over one year for medical reasons, 3) Dr. Evans had submitted a full medical report in late 1989, which indicated she

[2]Notably, Dr. Evans was one of the physicians who provided a report to PERS.

was permanently disabled and that she was unable to subdue prisoners or protect herself or others because of an arm injury and 4) she was being treated by Dr. Nasa for diabetes during the period of her absence. The respondent's stated concern was that the work environment might not be safe for the appellant because of her medical condition.

The appellant did not immediately obtain the requested medical release statements in a form deemed acceptable by the Department. On March 5, 1990, she gave the Department a preprinted form from Dr. Evans entitled "Disability Certificate" which stated that she was able to return to work on 3/5/90, and did not make reference to her work injury and did not refer to any restrictions. It was signed and dated by the physician on February 27, 1990.

The Department wrote Dr. Evans on March 13, 1990, requesting clarification of the status of the appellant's work-related injury. Dr. Evans responded by letter received April 6, 1990, clearing the appellant with respect to the injury.

The appellant saw her family physician, Dr. Nasa, on April 30, 1990. On May 22, 1990, Dr. Nasa issued a written release stating the appellant's hypertension and diabetes were under good control and she could return to her full duties. The release was received by the Department on May 25, 1990. The Department's return to work coordinator cleared the appellant and she was contacted to return to work the beginning of the following work week. The appellant

resumed work on May 31, 1990. She has been working full time since then without further incident.

Appellant charged that the Department's refusal to allow her to return to work from March 5, 1990 through May 30, 1990 constituted a constructive medical termination or suspension.

ISSUES

This case raises the following issues for our determination:

(1) Whether the Board has jurisdiction to hear this appeal?

(2) Whether an employee who has been on medical leave and who has been denied a disability retirement from PERS may be refused reinstatement to her position until that employee provides medical proof of fitness for duty?

DISCUSSION

Jurisdiction

The ALJ found the Board has no jurisdiction to consider this appeal in that appellant was not medically terminated pursuant to Government Code section 19253.5 and was not suspended under Government Code section 19570. We disagree.

The Board has long recognized the concept of a "constructive medical termination" and has asserted jurisdiction pursuant to Government Code section 19253.5 to hear such cases. (See John H.

Berman, SPB No. 22885 and JoAnn Guzman, SPB No. 24890)[3] A "constructive medical termination" arises when an appointing power, for asserted medical reasons, refuses[4] to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work.

The Board's jurisdiction to hear Mason's appeal derives from both the California Constitution and state statutes. Article VII, section 3 of the California Constitution gives the Board direct authority to "enforce civil service statutes." Government Code section 19996 defines the means by which a permanent civil service employee may be separated from state service:

> ...Any such employee may be temporarily separated from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement or terminated for medical reasons under the provisions of section 19253.5. (emphasis added)

[3]While prior decisions of the Board not designated as precedential are not binding, we find the rationale in the cited cases to be persuasive.

[4]The appointing power's "refusal" to allow the employee to work may be outright or may consist of an offer of reinstatement conditioned upon the employee undergoing various medical examinations or tests.

Mason alleged in her appeal that the Department was attempting to medically terminate her without giving her an appeal right to the Board. The Board has jurisdiction over medical terminations under the provisions Government Code section 19253.5. The fact that the Department did not formally institute medical termination proceedings against Mason does not deprive the Board of jurisdiction to determine the propriety of the Department's refusal to reinstate Mason for medical reasons.

Propriety of Departments Refusal to Reinstate

Mason contends that the Department's insistence that she produce, prior to reinstatement, further evidence of medical clearance was improper in light of the fact that she requested reinstatement only seventeen (17) days after PERS had denied her disability retirement, finding her "not substantially incapacitated for the performance of [her]...job duties as a Youth Counselor with the Department of Youth Authority." The Department answers that it was justified in refusing to reinstate Mason to her position as Youth Counselor unless she first submitted what it considered adequate proof of medical fitness for duty.[5] The Department argues that Mason's absence for over a year for job-related injuries and a diabetic condition raised concerns regarding her fitness for duty.

[5]Notably, the Department was insisting on medical clearance from Dr. Evans, the very doctor who advocated permanent disability retirement for appellant and whose opinion was rejected by PERS.

The Board recently addressed the issue of the appointing power's obligation to reinstate an employee after a finding by PERS that the employer is medically able to perform the duties of his or her position in its precedential decision Dana Jackson, SPB Dec. No. 93-01. In that case, which involved the attempted medical termination of a Medical Technical Assistant (MTA), we relied on statutory provisions, case law and an opinion of the Attorney General to support the following analysis:

> ...Once PERS denied the application for disability retirement, finding that appellant was not incapacitated to perform her duties as an MTA, the Department was clearly bound to reinstate appellant to paid status as an MTA and to pay her all back pay and benefits that would have accrued to her had she not been unlawfully medically terminated, from the date of the medical termination to the date of her reinstatement. The fact that the Department may disagree with the determination of PERS does not relieve it of its financial obligation to the appellant. As was noted by the appellate court in the case of Phillips v. County of Fresno, supra, the financial burden of litigating a disagreement between the employer and the retirement board concerning the employee's disability or lack thereof lies with the employer. The court further noted that if the employer chooses not to challenge the retirement board's decision, the employer must reinstate the employee retroactive to the date of termination. In either event, the employer may not leave the employee without income. (225 Cal.App.3d at pp. 1255-1258).

Similarly, in the instant case, once PERS had denied Mason's disability retirement, and once Mason requested reinstatement, the Department became obligated to reinstate Mason to her position as a Youth Counselor immediately or to put her on paid status as a

Youth Counselor pending an appeal of the PERS determination. There is nothing in the record to indicate the Department appealed the PERS determination. If the Department had reason to believe that Mason was not medically fit for the performance of her duties as a Youth Counselor based on a medical development not considered by PERS in its evaluation of the application for disability retirement, the Department had the option to refer Mason, immediately upon reinstating her, for a medical examination pursuant to Government Code section 19253.5(a). The Department did not have the option, however, of delaying reinstatement to paid status pending production of additional proof of fitness for duty.

CONCLUSION

For all of the foregoing reasons, we find that the Department's failure to reinstate Mason upon her request constituted a constructive medical termination of limited duration. We therefore order that Mason be compensated with back pay and benefits for the period of time she was unlawfully refused reinstatement.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the pleadings and papers on filed herein, it is hereby ORDERED that:

1. The above-referenced constructive medical termination is revoked;

2. The Department of Youth Authority and its representatives shall pay to Carole R. Mason all back pay and benefits that would have accrued to her had she not been constructively medically terminated;

3. This matter is referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member
Floss Bos, Member

*There is currently a vacancy on the Board

* * * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 3, 1993.

GLORIA HARMON

Gloria Harmon, Executive Officer

State Personnel Board